

Before the
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED & INSPECTED
MAY 9 - 2005
FCC - MAILROOM

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments,) MB Docket No. 02-266
FM Broadcast Stations) RM-10557
(Chillicothe, Dublin, Hillsboro, and)
Marion, Ohio))

TO: The Office of the Secretary
Attention: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Pursuant to §1.106 of the Commission's Rules and Regulations, 47 C.F.R. §1.106; §1(b)1 of the Commission's Rules and Regulations, 47 C.F.R. §1(b)1; and §405 of the Communications Act, 47 U.S.C. §405, the Committee for Competitive Columbus Radio (the "Committee"), by its attorney, hereby respectfully requests the Media Bureau to reconsider and set aside its *Report and Order* (DA 05-764), released in this proceeding on March 25, 2005, and published in the Federal Register on April 13, 2005, at 70 F.R. 19337.¹ In support thereof, it is alleged:

I. INTRODUCTORY STATEMENT

1. This proceeding involves the proposed re-allotment, downgrade, and change of community of license of Station WMRN-FM from Channel 295B at Marion, Ohio to Channel 294B1 at Dublin, Ohio. The proceeding was instituted at the request of

¹ Section 1(b)1 of the Rules provides that an order in a notice and comment proceeding becomes effective upon publication in the Federal Register. Section 1.106 of the Rules provides that a petition for reconsideration must be filed within thirty (30) days of the effective date of the order. The Order in this case became effective on April 13, 2005. This Petition is being filed within thirty (30) days of April 13, 2005 and is, therefore, timely.

No. of Copies rec'd 014
List ABOVE

Citicasters Company, the licensee of Station WSRW-FM, Hillsboro, Ohio and Citicasters Licenses, Inc., the licensee of WMRN-FM, Marion, Ohio. Both of these Citicasters companies are wholly owned subsidiaries of Clear Channel Communications, Inc. Thus, this proceeding was instituted for the benefit of Clear Channel and constitutes a reshuffle of stations already owned by Clear Channel.

2. By *Report and Order*, released March 25, 2005, the Assistant Chief of the Audio Division granted Clear Channel's request and approved the re-allotment, downgrade, and change of community of license of Station WMRN-FM from operation on Channel 295B at Marion, Ohio to Channel 294B1 at Dublin, Ohio. The staff did this over the objections of the Committee, Infinity Broadcast Operations, Inc. ("Infinity"), and Sandyworld, Inc. ("Sandyworld"). As will be shown, the staff committed procedural and substantive error and its decision should be reversed and set aside.

**II. THE STAFF ERRED IN APPROVING THE MOVE FROM MARION
TO DUBLIN, IN THE COLUMBUS MARKET WHERE, AS HERE, CLEAR
CHANNEL CANNOT OWN ANYMORE STATIONS IN THE
COLUMBUS MARKET.**

3. As explained, this proceeding was initiated by and for the benefit of just one company: Clear Channel. It is not a proceeding involving new FM allotments or allotments owned by different companies. That being so, the results of the proceeding are entirely predictable.

4. Clear Channel is going to wind up with an allotment at Dublin, Ohio, a contiguous suburb of Columbus, Ohio, situated in the Columbus, Ohio market. It is undisputed that, under the multiple ownership rules (47 C.F.R. §73.3555), Clear Channel cannot own anymore stations in the Columbus, Ohio market: it is "maxed out." That

being so, the question of Clear Channel's compliance with the multiple ownership rules is going to have to be confronted sooner or later.

5. The staff elected to confront the issue, later. It suggested that the issue be resolved at some later application stage. That ruling was erroneous.

6. Because we already know that Clear Channel cannot own another station in the Columbus market, it makes no sense to postpone confronting that issue, until some later time. It should be confronted right now.

7. True, Clear Channel has suggested that it might make a divestiture commitment. However, it has made no such commitment. Thus, it is impossible to evaluate the impact of the Dublin allotment on Clear Channel's share of the broadcast revenues in the Columbus broadcast market, where it remains by far the largest player. In its original Comments, the Committee referred to prior instances in which the Justice Department expressed concern over revenue concentration on the part of Clear Channel's predecessor Jacor, in the Columbus market. Those concerns, which stem from the anti-trust laws, remain a concern today.

8. Even in the days of the comparative hearings, divestiture commitments were required to be specific and timely. *Martin Intermark, Inc.*, 3 FCC Rcd 1650 (1988). Here, Clear Channel has not even made a commitment. Hence, it must be concluded that its ownership of a station in Dublin will contravene the provisions of the multiple ownership rules.

III. THE STAFF'S ACTIONS IN THIS CASE ARE WASTEFUL OF COMMISSION RESOURCES AND INCONSISTENT WITH PRIOR ACTIONS.

9. The Commission has a rule, §73.3518 of its Rules and Regulations, known as the "inconsistent application rule." It reads as follows:

“While an application is pending and undecided, no subsequent conflicting or inconsistent application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee.”

Where an applicant has filed applications and where a grant of all of the applications would cause the applicant to exceed its limit in a market under the Multiple Ownership Rules, the commission has routinely dismissed the offending applications. *T. C. Monte, Inc.*, 7 FCC Rcd 7572 (1992).

10. In *Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493 (1987), the Commission explained the purpose of the rule as follows:

“To accept Big Wyoming’s argument and allow applicants to amend their proposals to remove inconsistencies would totally undermine the inconsistent application rule which is designed ‘to avoid the waste of Commission resources, prejudice to other applicants, and delay of service to the public which arises when the Commission must process applications by the same person or entity, not all of which can be granted. *Valley Broadcasting Co., (KVBC-TV)*, 58 RR 2d 945 (1985). Big Wyoming’s argument that the subsequent amendment purportedly rendered its Rock Springs application grantable ignores the fact that Commission resources had already been wasted in processing their original Rock Springs application which was not grantable. The mere fact that the amendment may cure the overlap does not justify reprocessing of their application which would necessitate a second engineering study.”

11. In this case, it is undisputed that Clear Channel is “maxed out” in the Columbus market, *i.e.* that it already owns all of the stations that it is permitted to own under the provisions of the multiple ownership rule, 47 C.F.R. §73.3555. That being said, staff resources have been devoted in this proceeding to accommodate a move of one of Clear Channel’s stations from Marion to Dublin which is impermissible under the

current rules. The same reasoning should be applied here that applies to the cases arising from the inconsistent applications rule. If an implementing application to move from Marion to Dublin would violate the multiple ownership rule (and it would), the staff should not have wasted valuable Commission resources on a rulemaking perceived to accommodate such a rule in the absence of a firm showing that the move could be accomplished.

12. No such showing was submitted, however. Although Clear Channel hinted that, in the future application proceeding, it might make a divestiture commitment, no such commitment was ever made in this proceeding.

**IV. THE CLEAR CHANNEL PROPOSAL DOES NOT CREATE
A PREFERENTIAL ARRANGEMENT OF ALLOTMENTS.**

13. In *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), the Commission established the following allotment priorities: (1) first full time aural service; (2) second full time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). By concentrating on priorities 1 through 3 and virtually ignoring priority 4, the staff has approved a reshuffle of a station owned by Clear Channel which does not create a preferential arrangement of allotments.

14. Clear Channel's proposal contemplates downgrades for both stations WMRM-FM and WSRW-FM which would result in loss of service to the public. The proposal contemplates the loss of the only FM station in Marion, Ohio, a community of 66,217 persons (2000 population) with sufficient height and power to adequately serve the surrounding rural areas. It leaves Hillsboro, Ohio (pop. 6,368) with only one local

station, a daytimer, whereas it presently has two. Finally, by virtue of Clear Channel's ownership of the affected stations, and the relocation of station WMRN-FM to the Columbus Urbanized Area, where Clear Channel already has other stations in the market and has the highest revenue share of any player, the proposal creates an undue concentration of economic power in the hands of Clear Channel in the Columbus market.

15. The Committee addressed these concerns in its original Comments, filed in this proceeding and we reiterate all of our concerns, expressed in those original Comments, as if a part of this Petition of Reconsideration. We recognize, however, that at the time of the filing of our original Comments, the Commission had a policy of "flagging" transactions which threatened to create an undo revenue share. We also recognize that, in the intervening time period, the policy of "flagging" has been replaced with a policy of relying upon the newly reconstituted multiple ownership rules set forth in 47 C.F.R. §73.3555. That, however, is precisely the point. The ownership by Clear Channel of an additional station in Dublin, which is part of the Columbus market as defined by Arbitron, violates those new multiple ownership rules. Hence, our concerns about economic concentration and compliance with the anti-trust laws set forth in our original Comments have simply been fully vindicated by subsequent events and the adoption of the new rules. We were right in the first place and remain right, today. In recent cases, the Media Bureau has made it clear that under the new multiple ownership rules, the Arbitron Metro "is the presumptive geographic market for determining compliance with the rule's numerical limits," and that "*in virtually all cases*, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest." See *Review of the Commission's Broadcast Ownership*

Rules, et al, 18 FCC Rcd 13724-28 (2003), cited with approval in *Eagle Broadcasting Company, Inc.*, DA 05-1284, released May 4, 2005, and *MBC Grand Broadcasting, Inc.*, DA 05-1306, released May 6, 2005. Thus, if the Arbitron Market is the presumptive market, Clear Channel's Dublin move-in, *ipso facto*, violates the new multiple ownership rules.

16. Postponing the decision on the anticompetitive aspects of Clear Channel's proposal to a later application proceeding, as suggested by the staff, is merely delaying the inevitable. If the anticompetitive effects of the proposal are not resolved in this proceeding, they will have to be resolved in a future application proceeding. Thus, the FCC's resources will have to be brought to bear on this issue not once, but twice. That makes no sense. The time for the FCC to confront these issues is now, in this proceeding. Otherwise, scarce Commission resources will have to be brought to bear on the same issue in some later proceeding, contrary to the reasoning behind the inconsistent application cases, cited *supra*.

V. CONCLUSION

17. This was, and is, a proceeding initiated by and for the benefit of one company: Clear Channel. The objective of the proceeding is very simple: to allow Clear Channel to move an additional station into the Columbus market, where it already has the largest share of broadcast revenues.

18. Although the staff knew that Clear Channel has already "maxed out" in the market and cannot own anymore stations without violating the multiple ownership rules (47 C.F.R. §73.3555), the staff nonetheless elected to approve the move-in, stating

that the issue of compliance with the multiple ownership rules would be deferred until some later application proceeding.

19. This was clearly error. There was no point in using scarce staff resources to allow Clear Channel to own an additional station in the Columbus market where, as here, Clear Channel cannot own an additional station in the Columbus market without violating the Rules.

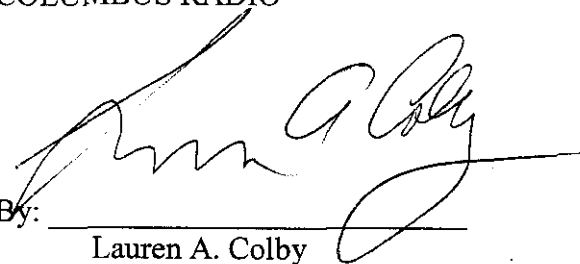
20. Therefore, the staff decision must be reversed and set aside.

Respectfully submitted,

May 6, 2005

THE COMMITTEE FOR COMPETITIVE
COLUMBUS RADIO

Law Office of
LAUREN A. COLBY
10 E. Fourth Street
P.O. Box 113

By: 
Lauren A. Colby

CERTIFICATE OF SERVICE

I, Kelli A. Muskett, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 6th day of May, 2005, to the offices of the following:

Mark N. Lipp, Esquire
Vincent & Elkins
1455 Pennsylvania Avenue NW
Washington, DC 20004

U.S. Department of Justice
Antitrust Division
601 D Street NW, Room 10528
Patrick Henry Building
Washington, DC 20530

Steven A. Lerman, Esquire
Dennis P. Corbett, Esquire
Jean W. Benz, Esquire
Leventhal, Senter & Lerman, PLLC
2000 K Street NW, Suite 600
Washington, DC 20006
(Counsel for Infinity Broadcasting Operations)

Jerrold D. Miller, Esquire
Miller & Neely, PC
6900 Wisconsin Avenue, Suite 704
Bethesda, MD 20815
(Counsel for Sandyworld, Inc.)

R. Barthen Gorman, Esquire
Audio Division
Media Bureau
Federal Communications Commission
The Portals
445 12th Street SW
Washington, DC 20554 *



Kelli A. Muskett

* *Via Federal Express*